IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT

CONSOLIDATED MUTUAL OIL COMPANY, a Corporation, and J. M. McLEOD, Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee. — No. 2787.

CONSOLIDATED MUTUAL OIL COMPANY, a Corporation, and J. M. McLEOD, Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee. — No. 2788.

NORTH AMERICAN OIL CONSOLIDATED, a Corporation, et al., Appellants,
vs.
THE UNITED STATES OF AMERICA, Appellee. — No. 2789.

Points Supplemental to the Oral Argument of Charles S. Wheeler.

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F. D. MONCKTON, Clerk.

By.....Deputy Clerk.

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POINTS SUPPLEMENTAL TO THE ORAL ARGUMENT.

I.

Case No. 2789, Relating to Section Two.

The oral argument has reduced this case to a few very simple propositions of law.

All counsel are now agreed that the government is not entitled to this property if the possession and diligence of the Pioneer Midway Oil Company on the 27th day of September, 1909, were such that the courts at that date would have protected said occupant against hostile intrusion by a private person.

Two things are required before the courts will protect the possession of a mining claimant.

1. He must have the *pedis possessio;* and (2) It must appear that he is with due diligence prosecuting his work toward a discovery.

Miller v. *Chrisman,* 140 Cal., 440, 447.

The facts here being undisputed the question of "due diligence" is a question of law.

> "Due diligence is sufficiently clearly defined to enable the courts to determine whether any given state of facts is sufficient to constitute it or not."

Ophir Silver Min. Co. v. *Carpenter,* 4 Nev., 534.

RECENT DECISION IN THE EIGHTH CIRCUIT FAVORABLE TO APPELLANTS.

We now have the benefit of the opinion of the Court of Appeals for the Eighth Circuit, affirming the judgment rendered by Judge Riner in the case of *United States* v. *Ohio Oil Company, et al.,* referred to and relied upon in Appellants' brief.

For the convenience of the Court a copy of said opinion is printed as an Appendix hereto.

The said opinion is authority for several propositions important to this controversy, viz:

1. It is not essential under the Pickett Act that the claimant must have been actually drilling on the date of the withdrawal. The government's contention to that effect is "too narrow."

2. It is not even essential that any work whatever shall have been done upon the land itself prior to the withdrawal order.

3. The following activities are sufficient to make out a case of due diligence at the date of the withdrawal order: Paper locations upon two claims were made more than one year before the withdrawal order. A few days before the withdrawal order, possession was taken and both claims were placed in charge of one caretaker. Two days before the withdrawal some lumber and material was ordered shipped to the lands. An oral contract to drill wells on the property was also made one day before the withdrawal. Tent equipments were brought to the land and put up one day before the date of the withdrawal. The lumber and equipment so ordered to be shipped had not arrived on the land prior to the date of the withdrawal order. *Held,* that the Ohio Oil Company was a *bona fide* occupant of the land "engaged in diligent prosecution of work leading to a discovery of oil" at the date of the withdrawal within the meaning of the Pickett Act.

In the case at bar the efforts of the occupant to begin actual drilling had progressed at the date of the withdrawal so much farther than those held sufficient in the foregoing decision, that little room is left for discussion.

If there was "due diligence" in the Ohio Oil case on May 6, 1914, it seems necessarily to follow that there was due diligence in our case on September 27, 1909.

LAW OF DUE DILIGENCE DOES NOT EXACT THE IMPOSSIBLE.

However, the claim is made that notwithstanding the elaborate outlays and preparations for actual drilling upon our properties, we must lose all, because the occupant had not succeeded in procuring a supply of water and was not in fact drilling on or before September 27, 1909.

At said date each claim was improved to the point that nothing remained to be done after a water supply was secured in order to start the actual drilling, save to hang drilling tools on the fully-rigged derricks, set up boilers, and place engines in the engine-houses and connect the same. The installation of such machinery, including boilers, was a matter requiring but a few days' work at most. It was something that could easily be done after a water supply was secured and while a pipe-line was being laid to connect up with such water supply. It would be neither wise nor good practice to install the machinery

until water was definitely arranged for. It is to be noted, moreover, that work of a character necessary to development, such as leveling and clearing away brush, was actually going on on each of the claims at the date of the withdrawal order.

But counsel for the government are not satisfied with a showing that all that was reasonably possible had in fact been done at the date of the President's order. They say that the claimant must have done the impossible. They do not dispute Appellants' showing that the occupant on and prior to the 27th day of September, 1909, could not get water; nor do they offer proof that the occupant made no diligent efforts to that end. These facts they say are of no consequence. So, also, the fact that water was brought to the land at the very earliest moment that the water corporation could supply it, and the fact that the occupants were absolutely ready, with their pipe-line laid and machinery in place to start drilling three weeks before the public-service corporation could supply the water, are brushed aside by the government's counsel as affording no explanation of the delay in starting prior to September 27, 1909, which the court can accept.

To so much of this harsh view of the law as requires that drilling shall have begun prior to the withdrawal, the Court of Appeals for the Eighth Circuit has already given the proper reply:

"But, it is claimed that . . . the defendant, the Ohio Oil Company, was not a *bona fide* occupant or claimant of these lands, in the diligent prosecution of work leading to the discovery of oil or gas on May 6, 1914, when the order of withdrawal was made. It is claimed that actual drilling operations were not commenced until July 1, 1914, on the northwest quarter, and on July 31, 1914, on the east half of the southwest quarter, and that until the actual drilling was begun there was no prosecution of work within the meaning of the Act of Congress. **We are of the opinion that this is too narrow a view to take of this statute.**"

United States v. *The Grass Creek Oil & Gas Co. and The Ohio Co.* (See Appendix).

IN VIEW OF THE PHYSICAL CIRCUMSTANCES OF THE LOCALITY, AND THE MAGNITUDE AND DIFFICULTY OF THE ENTERPRISE, A NECESSARY DELAY OF A FEW MONTHS IN OBTAINING A WATER SUPPLY IS PURELY INCIDENTAL AND EXCUSABLE.

The claimant was called upon to drill at least four wells—each to go down over one-half mile into the earth. This gigantic undertaking was to be performed in an arid country. Water was absolutely essential to it. It is common knowledge that each such well costs from $25,000 to $100,000 or even more.

To so much of our opponents' harsh contention as would forfeit the fruits of the claimants' vast outlay and labor, simply because of an unavoidable and relatively brief delay in obtaining a necessary material for this great enterprise, the courts have long since given an answer, for it is settled that a delay in work caused by the inability to obtain a necessary material will be excused.

Courts will take into consideration the surrounding circumstances:

> "such as the nature and climate of the country traversed . . ., together with all the difficulties of procuring labor and materials necessary in such cases."

Kimball v. *Gearhart,* 12 Cal., 27, 30.

> "What is a reasonable time and what constitutes reasonable diligence must depend largely on the facts of the particular case, . . . but it may be said that they depend chiefly on the physical circumstances of the locality, the nature and condition of the region to be traversed, and its accessibility, the length of the season in which work is practicable, the supply of labor, and *the magnitude and difficulty of the works necessary.*"

State v. *Superior Court* (Wash.), 126 Pac., 945, 953.

> "The only matters in cases of this kind which can be taken into consideration are such as would affect any person who might be engaged in the same undertaking, such as the state of the weather, the difficulty of obtaining laborers, or something of that character."

Ophir Silver Min. Co. v. *Carpenter,* 4 Nev., 534.

In the same case "due diligence" is defined as follows:

> "It is the doing of an act, or series of acts, with all *practical expedition,* with no delay, *except such as may be incident to the work itself.* The law, then, required the grantors of the defendants to prosecute the work necessary to an execution of the design with all *practical* expedition." (Italics ours.)

What these claimants and their predecessors did was to proceed with all *practical* expedition. Nothing was undone or delayed that it was possible or practical to do. The delay—which was brief in relation to the magnitude of the enterprise—was "incident to the work itself." It resulted from the "nature and climate of the country," which made it not only difficult, but impossible to procure a necessary material immediately. It was procured as soon as possible and the work of drilling proceeded diligently thereafter.

The case therefore falls directly within the authorities. There are none which hold that a delay occasioned by a temporary inability to obtain an essential material such as water is fatal to a claim of due diligence.

In their Reply Brief counsel would have it that we sat around supinely during the several months prior to September 27, 1909, doing nothing and dreamily waiting for "somebody" to bring in water. That is not true. We not only put up our buildings and derricks and bought our boilers, but we drilled a well in a fruitless search for water (Tr., p. 62). We made constant, continuous and diligent efforts to secure water (Tr., pp. 59-60), but "it was impossible to get water on said section in sufficient quantity for drilling at any time prior to the 27th day of September, 1909" (Tr., p. 62).

COUNSEL HAVE SHIFTED THEIR POSITION AS TO SECTION 2.

Since the oral argument, counsel for the government have shifted their position radically. Prior to the filing of their reply brief the only charge which appellants had been called upon to meet was the claim that there had been a lack of diligence in discovery work prior to September 27, 1909. Now our opponents say for the first time that we were derelict between October 12th, 1910, and March 1st, 1911. Hence they insist that while the Pickett Act may have revived our rights for a time we afterwards lost them under said act through a failure to continue to exercise diligence. This argument becomes of importance only in the event that the Pickett Act affects us; for it is only under that Act that the question of continued diligence arises.

Heretofore the contention of counsel for the government has been that the impossibility of obtaining a water supply affords no excuse for our delay in beginning actual drilling prior to September 27, 1909. They have stood upon the proposition that because we did not obtain water and begin to drill during the ninety-six days which passed between the date of the purchase of boilers for our property on June 21, 1909, and the date of the withdrawal order, we had no rights which were preserved by the Pickett Act.

But now counsel evidently have found this position

untenable under the authorities, and for the first time they, in their Reply Brief, come forward with the new claim that these appellants have not been diligent at all times since October 12th, 1910, several months prior to which time we had obtained water and had begun the drilling of our wells.

NO SUCH ELEVENTH-HOUR CHANGE OF FRONT CAN BE TOLERATED.

The government's own pleading and evidence estop it from making such a claim. The complaint contains no allegation that there was no diligence after June 25, 1910. It proceeds wholly upon the theory that the lands were withdrawn on the 27th day of September, 1909 (Tr., pp. 5-6). It asserts that we were not in diligent prosecution of work leading to discovery of oil at the date of said withdrawal (Tr., p. 9). The bill even alleges that we made discovery of oil as early as August, 1910, and that we have extracted large quantities of oil and gas since that time (Tr., p. 7). Not only does the complaint make no charge of lack of diligence after the Pickett Act was passed, but the government presented in support of its application for a receiver the affidavit of Schuyler G. Tryon, who was in charge of drilling operations on this property from March 15, 1909, to March 1, 1911 (Tr., pp. 50-51). In that affidavit the government itself presents to the

Court the following evidence of our diligence during that period:

> "That during the entire time affiant was in charge of drilling operations on said Section 2, the said drilling operations proceeded with all possible diligence and all said wells aforesaid were drilled as expeditiously as possible under existing conditions as to water and delivery of freight" (Tr., p. 56).

And now in the face of their own pleading and said affidavit, counsel for the government pick out from this same affidavit a mere inference that during Tryon's superintendency no drilling was done on any of these claims between October 12, 1910, and March 1, 1911, and are bold enough to say to this Court, in the very teeth of the said affidavit of their own witness to the contrary, that we were not diligent during all of said Tryon's time!

Comment is perhaps unnecessary. But the fact is that Mr. Tryon's affidavit does not fairly justify any inference that there was any period after the Pickett Act was passed during which drilling was not in fact going on. Said affidavit tells of successive drilling on each of the four quarters of the section. As to three of these quarters Mr. Tryon is particular to say that drilling stopped on designated dates and was not resumed thereafter (Tr., pp. 54-55). *But as to Well No. 1 on the SE¼ the affiant makes no such statement* (Tr., pp. 52-53). This fact coupled with said Tryon's declaration that the work progressed with all of the diligence possible under the existing

conditions, properly gives rise to the inference that after drilling ceased on Well No. 4, drilling was resumed on Well No. 1 and was still in progress when Mr. Tryon left the property.

Mr. Laymance's affidavit, moreover, shows that in October, 1910, water was obtained from a new well on this section of land; that it was used and proved insufficient; that shortly after beginning to use it, he laid a two-inch pipe from the center of the section to another supply which furnished water enough to drill one well at a time. Said affidavit also shows that he had to "rotate" in the drilling, viz: that the water supply was sufficient to run but one set of tools at a time. Both he and Tryon say that all of the wells were drilled as expeditiously as possible under the existing water conditions (Tr., p. 66). The only fair inference from this testimony is that one string of tools was continuously at work on the section during the period between October, 1910, and March, 1911.

But if it were true—and it is not—that we did not drill between October, 1910, and March, 1911, what difference would it make, since the government does not allege in its complaint that the rights preserved to us by the Pickett Act ceased under that act for want of subsequent diligence? How could the mere fact—even if it were true—that no drilling was in progress during said period, affect us adversely when the affidavit prepared and filed by the government shows that we actually went ahead during that

period as diligently as possible under existing conditions as to water? If one is as diligent as is *possible,* that should satisfy any conceivable rule of due diligence called for by the Pickett Act.

THESE LOCATIONS WERE NOT WITHDRAWN BY THE ORDER OF SEPTEMBER 27, 1909, AND THE PICKETT ACT DOES NOT APPLY TO THEM.

The proviso in the Pickett Act is a restriction upon the President's otherwise unlimited power to withdraw from entry all locations or claims not perfected by discovery. The President in such an order may or may not have used language which would have the effect to impair such rights as were ours on September 27, 1909.

If the President so words his order that the rights of the locator would in the absence of remedial legislation be "affected or impaired by such order," then and only then does the Pickett Act step in and say that the order of the President shall not operate to affect or impair the claimant's rights so long as the claimant shall continue in diligent prosecution of discovery work.

But if, as in the order of September 27, 1909, the President himself has excluded from the withdrawal all *bona fide* locations which at that moment are attended with possession and due diligence, then of course the President's order does not purport to "affect" or "impair" the rights of the occupant of

such locations, and there is nothing upon which the Pickett Act can operate.

It results, therefore, that it is only in the event that this Court shall refuse to follow *United States* v. *McCutchen,* 234 Fed., 702, 711, in regard to the effect of the withdrawal order that the Pickett Act can be held to have any application to the land in suit. If said Act has no application thereto, then, of course, the question of continued diligence called for by said Act, cannot arise in this case.

APPELLANTS WERE PERMITTED BY THE WITHDRAWAL ORDER TO PROCEED TO MAKE DISCOVERIES. THEY HAVE DONE THIS AND NO QUESTION OF DILIGENCE CAN EVER ARISE IN SUCH A CASE.

The question of continued diligence arises only in cases to which the Pickett Act applies.

If the construction given to the President's order in *United States* v. *McCutchen,* 234 Fed., 702, 711, is followed by your Honors, then our locations, because of the fact that they were attended on September 27, 1909, with actual possession and due diligence, did not become a part of the withdrawn area.

The Pickett Act in that event does not apply to our case. Each of our claims continued to be, at least as to us, a part of the open public domain. We went ahead on each claim and discovered oil. Our rights are exactly what they would have been had our locations been upon any other public land not affected by the withdrawal order, viz: Upon each

discovery our right to the location became a vested right which the government could not take from us, unless by eminent domain.

Manuel v. *Wolf,* 152 U. S., 504.

The government can no more question these claims for any alleged lack of diligence prior to discovery than it could question on the like ground the perfected claims of any other miner upon the open public domain.

Under the general mining laws the government does not care whether the locator is diligent or not after posting his notice and prior to discovery. His right is perfected by a discovery regardless of any question of his diligence *ad interim.*

How soon after posting our notices, or how soon after September 27, 1909, we made discovery of oil is of no consequence. Even a delay of eight years would not matter.

Borgwardt v. *McKittrick Oil Co.,* 164 Cal., 651.
Weed v. *Snook,* 144 Cal., 443;
Miller v. *Chrisman,* 140 Cal., 448.

It is enough that our claims were valid and existing at the date of the withdrawal order, that we went on —whether diligently or otherwise does not matter— with our discovery work, and that discoveries have

long since been made. The government cannot now deprive us of our vested rights in these perfected locations.

THE RIGHT TO "PROCEED TO ENTRY" UNDER THE TAFT WITHDRAWAL ORDER INCLUDES THE RIGHT TO PROCEED TO MAKE A DISCOVERY.

Counsel for the government say:

> "The position of Appellants necessarily involves the contention that President Taft intended to provide for entry under the mineral land law *where there had been no discovery*." (Italics ours.)

Reply Brief, p. 3.

This is a misconception of our position. We do not claim that entry in the Land Office could be made under the President's said order until after a discovery. Mining locators in actual possession are allowed by general law to go ahead with their drilling, make their discoveries, enter the land, and obtain patents therefor. That was the "usual manner" in which such locations were wont to "proceed to entry." And that is what President Taft's order obviously means. That, moreover, is exactly what it has been held to mean in *United States* v. *McCutchen,* 234 Fed., 702, 711. Before entry in the Land Office there must be a discovery on each location.

IF THE PICKETT ACT IS APPLICABLE TO OUR CASE IT SHOULD BE NOTED THAT SAID ACT IS NOT CONCERNED WITH THE LOCATOR'S DILIGENCE BETWEEN SEPTEMBER 27, 1909, AND JUNE 25, 1910, THE DATE OF THE ACT.

We have dealt with this proposition in our briefs and on oral argument. Counsel for the government now come back to it in their Reply Brief, pp. 24-25, and insist that the Act calls for continuous diligence from and after September 27, 1909.

The Act plainly says that "the rights of any person "who at the date of any order . . . heretofore ". . . made, is a *bona fide* occupant and who *at* "*such date* is in diligent prosecution of work . . . "shall not be affected or impaired by such order so "long as such occupant *shall continue* in diligent "prosecution of said work."

Counsel for the government would wrest this language from its obvious grammatical meaning in order to make it exact a continuance of work, in defiance of the President's order, between September 27, 1909, and the date of the Act. To accomplish this, they distort the words of the statute as follows:

> "The Act . . . provided that the right which it extended should not be affected or impaired *so long as there was a continuation* of 'diligent prosecution of said work.'"

Reply Brief, p. 24.

But that is not what the Act says. Its words are "so long as such occupant or claimant *shall continue*

in"—not, *'so long as there was a continuation of'*—"diligent prosecution of said work."

Diligence at the date of the withdrawal, and (as to past withdrawals) from and after the date of the Act is all that is called for in the way of diligence. What discovery work the occupant may have done in the interim or failed to do is not material.

Were it otherwise the Court would not, of course, overlook the fact that water conditions continued the same at all times between June 21, 1909, and March 15, 1910. The fact that appellants were unable to drill during that whole period because of this shortage of water would not in any event evidence a lack of diligence.

II.

Cases No. 2787 and No. 2788, Relating to the N. E. ¼ and the N. W. ¼ of Section 28.

What we have said above when dealing with Section 2 in advocacy of the interpretation put upon the Taft withdrawal order in *United States* v. *McCutchen*, 234 Fed., 702, 711, applies also to this section.

If that case is to be followed on that question—and we submit that it is a correct determination and should be followed—then we are not in either of these suits affected by the Pickett Act. We were using due diligence on each of our claims at the date of the withdrawal; they were therefore not withdrawn from entry so far as we were concerned. We

have since proceeded to discovery on each claim and that ends the matter.

Our opponents' argument and brief proceed entirely upon the theory that the Pickett Act—and not the withdrawal order and the general mining law—governs our rights.

While confident that *United States* v. *McCutchen* will be followed and hence that the Pickett Act does not apply to these two cases, we must nevertheless proceed upon the contrary assumption and answer our opponents' views on the Pickett Act.

OUR POSITION ON SECTION 28 MISSTATED.

Counsel misstate our position on page 15 of their Brief, when they say "in numbers 2787 and 2788 it is "not even contended that work of any character what-"ever was in progress at the date of the withdrawal." Our contention is directly to the contrary.

In these cases Appellant McLeod and his lessee were in diligent prosecution of work leading to a discovery of oil on the land in question at the said date.

There is no room for the slightest doubt on that point, for on June 25, 1909, within three months prior to said date of withdrawal, the lessee had agreed to drill wells on each quarter of section 28 (Tr., p. 78), and had pursuant to that purpose built a large central camp (Tr., p. 79), and had erected a storage water tank (Tr., p. 85) and built a two-inch pipe-line

four miles long to the only available water supply, and built a derrick on each quarter section; and some thirty days before the order was made, had begun drilling on the first well and was actually drilling when the order was made.

Such a showing of diligence should satisfy the most exacting test. But here again it is insisted that due diligence demands the impossible—that we should have been drilling four wells contemporaneously on said 24th day of September, 1909. The answer is that this was a physical impossibility, for the reason that although the pipe-line and storage facilities were of proper capacity to accommodate more water, it was impossible to obtain at that time a supply which was more than barely sufficient to run a single string of drilling tools (Tr., pp. 79, 100-104).

The law of due diligence does not exact the impossible. It takes into consideration the physical and climatic conditions of the region, the magnitude and difficulty of the enterprise and the temporary impossibility of procuring a necessary material, such as water.

Kimball v. *Gearhart,* 12 Cal., 27, 30;
State v. *Superior Court* (Wash.), 126 Pac., 945, 953;
Ophir Silver Mining Co. v. *Carpenter,* 4 Nev., 534.

On and prior to September 27, 1909, the claimants of these lands did everything possible toward drilling on this land, and that phase of the controversy may be dismissed.

It is not conceivable that a court would have refused to protect our possession of these two claims against hostile intrusion on that date; and that is admittedly the sole test of the diligence which both the general law and the Pickett Act call for.

THE CLAIM THAT WE MUST HAVE BEEN ACTUALLY DRILLING ON EACH CLAIM AT THE DATE OF THE WITHDRAWAL HAS BEEN ADJUDGED TO BE TOO NARROW.

Counsel's contention that we must have been actually drilling on each claim on the day of the withdrawal has been set at rest by the decision of the Eighth Circuit:

> "It is claimed that actual drilling operations were not commenced until July 1, 1914, on the northwest quarter, and on July 31, 1914, on the east half of the southwest quarter, and that until the actual drilling was begun there was no prosecution of work within the meaning of the Act of Congress. We are of the opinion that this is too narrow a view to take of this statute."

United States v. *The Grass Creek Oil & Gas Co. and The Ohio Oil Company* (Printed as an Appendix hereto).

This shows that the second well was not started for about one week after oil was produced in the first. The full details of the order in which the

work was done are given with appropriate references to the record in the brief of appellees in that case, pages 8-9, and are as follows:

> "On June 25, 1914, the pipe for the Ohio Oil Company's water line to the NW¼ of Section 18 was laid (Rec., p. 78), and drilling operations were immediately, upon the completion of the rig, started, continuously prosecuted, and oil in commercial quantities was obtained on the quarter section last mentioned on July 14, 1914 (Rec., p. 118). . . .
>
> "Immediately after July 14, 1914, the rig was moved over to the East half (E½) Southwest quarter (SW¼) of Section Eighteen (18), and no delay occurred in prosecuting the work of producing oil in commercial quantities on that tract of land (Rec., p. 118).
>
> "The timber and material that were in the derrick for drilling on the tract last mentioned were, for the most part, put there July 16, 1914 (Rec., p. 151). Immediately upon the completion of the rig, drilling began at midnight of July 31, 1914, on the East half (E½) Southwest quarter (SW¼) of Section Eighteen (18), and was continuously prosecuted until completion of the well, which occurred on August 10, 1914, oil in commercial quantities being obtained (Rec., p. 118)."

We thus see that in the case in the Eighth Circuit the derrick was erected for drilling the second well after the first well was completed, and the rig used on the first well was then moved over to the other claim. In other words, we have in that record a plain case of consecutive drilling.

The Court holds that such consecutive drilling is a diligent prosecution of work such as is called for by the Pickett Act.

If it be objected that one well followed closely upon another in that case, the same is true in the case

at bar; for here without waiting to complete our first well we began to drill the second and the third (Tr., pp. 110-112), and from one to three strings of tools were operating until ten producing wells were drilled.

If it be objected that in the Wyoming case it took but a few weeks to drill a well; that the oil was obtained at about 1000 feet, and that all discoveries were made within a period of four months from the time the work preparatory to drilling began, and that it would be an improvident waste of money to go to the expense of buying extra rigs for drilling the wells contemporaneously—the answer is:

First: When we began the drilling of our wells we expected to discover oil in from thirty to ninety days (Tr., p. 88). No long delay was expected.

Second: If consecutive drilling will satisfy the law of due diligence where all of the conditions as to water and depth are favorable and the drilling relatively inexpensive, and if in such cases the failure to drill the wells contemporaneously is merely a question of saving money, how much more must it satisfy the said law when, as here, the conditions are thoroughly difficult, the available water supply deplorably inadequate, and where the cost of drilling to a great depth is necessarily very great? In the Wyoming case, moreover, consecutive drilling appears to have been a matter of choice. In our case, on the con-

trary, consecutive drilling was an absolute necessity, because the water could not be had with which to drill any more expeditiously.

THE FACTS HELD BY THE EIGHTH CIRCUIT TO EVIDENCE DUE DILIGENCE AT THE DATE OF THE WITHDRAWAL ORDER ARE MUCH LESS CONVINCING THAN THOSE HERE BEFORE THE COURT.

In that case practically nothing at all had been done on the land prior to May 6th, 1914, the date of the withdrawal order there in question.

Location notices had been posted on July 20, 1913. The claimant had not even had the *pedis possessio* between July, 1913, and April, 1914. A few days before the order was made one man was placed in charge of the two claims as "caretaker." Not a building or derrick was on the ground until after the order was made. The things done and the oral lease and the agreement made one day before the withdrawal order for drilling two wells are far less convincing as evidence of diligence than are the written lease which we have in this case from McLeod to Mays of June 25, 1909 (Tr., p. 90), and the improvements made and work done pursuant thereto prior to the date of withdrawal.

THE MEANING ASSIGNED BY COUNSEL TO THE PHRASE "AT THE DATE" IS ALSO TOO NARROW.

The law does not exact that we must have been doing any actual physical work on or relating to these properties on the very day of the withdrawal. The

law says that we must have been in diligent prosecution of work leading to discovery of oil or gas on the lands we occupy or claim "*at* the date"—not "on the day"—of the withdrawal order.

> "The authorities corroborate this interpretation of the word 'at': That, when used both as to time and as to place, it has a certain latitude of intent, and means often 'near' or 'about.' *Rogers* v. *Galloway Female College,* 64 Ark., 627; 44 S. W., 454; 39 L. R. A., 636; *Bartlett* v. *Jenkins,* 22 N. H., 53, 63; *Hunter* v. *Wetsell,* 84 N. Y., 549, 554; 38 Am. Rep., 544; *United States* v. *Buchanan* (D. C.), 9 Fed., 689, 691; *Minter* v. *State,* 104 Ga., 743, 752; 30 S. E., 989; *Rice* v. *Kansas Pac. Ry.,* 63 Mo., 314, 323. It is quite clear from these authorities that there is no absolute or verbal necessity of construing 'at' as strictly equivalent to 'on.'"
>
> *Lorraine Mfg. Co.* v. *Oshinsky,* 182 Fed., 407, 408.

In construing a remedial statute a liberal meaning is to be given to the words used. Our work in building a pipe-line, erecting derricks, buildings and structures on these two claims between June 25, 1909, and September 27, 1909, means that we were diligently prosecuting work "at" said last named date.

THE LEASE WAS ENTIRELY CONSISTENT WITH THE LAW OF DUE DILIGENCE. THAT LAW SANCTIONS CONSECUTIVE DRILLING.

It is objected that the lessee could abandon the lease after drilling the first well. But if there were no lease the claimant could do the same thing at any time—even if he himself were drilling four wells contemporaneously. There was therefore nothing con-

trary to the spirit of the law in a lease which under certain conditions would permit the lessee to do exactly what the lessor could do.

Again, it is claimed that because the lease of June 25, 1909, calls for the immediate drilling of one well, and then for the contemporaneous drilling of three more as soon as the first is completed, that we have actually bargained to drill in a way that was not diligent.

One answer to this is that the lease was entered into by both parties with a full knowledge of the existing water conditions (Tr., p. 79). They knew that water was immediately available for but one string of tools. They expected that the water company would improve its supply as it was promising to do (Tr., pp. 79-80), and that more strings of tools could be used contemporaneously by the time the first well was completed.

But had these facts not existed, a thoroughly conclusive answer is nevertheless afforded by the fact that:

Where there are several contiguous claims, the law of due diligence is satisfied if they are drilled consecutively.

The recent decision handed down in the Eighth Circuit, which is printed as an appendix hereto, has set this question at rest.

The court recites the facts as to the consecutive drilling as follows:

> "He began actual drilling operations on the northwest quarter on July 1, 1914, as soon as the drilling apparatus

had been erected and was in working order, finishing the well on July 24, 1914, when, having drilled to a depth of 1047 feet, oil in commercial quantities was discovered. Actual drilling on the east half of the southwest quarter was begun by him on July 31, 1914, and continued until August 20, 1914, when oil was discovered in commercial quantities at the depth of 965 feet."

See Appendix.

MEANING OF "WORK LEADING TO DISCOVERY OF OIL OR GAS."

This phrase in the Pickett Act is entitled to a liberal interpretation.

It does not mean that the work going on must actually result in the technical "discovery" which is essential to perfect a mining location. Work actually and diligently going on on a claim on September 27, 1909, may result in no discovery at all. It may result in a dry hole, which is ultimately abandoned; and yet no one will doubt that such drilling is "work leading to discovery."

It is the character of the work at the date—not the final result of it—that counts.

Suppose that we had actually been drilling at our two derricks on these claims on September 27, 1909. Suppose that we had ultimately lost both holes, or had become discouraged at not finding oil therein at great depth, and after two years of drilling, had gone half a mile higher up on the formation on these same claims and had built new derricks, bought new machinery, obtained a different water supply and thus beginning

altogether anew, had finally discovered oil at the new wells:

Would it be said that we would lose our claims because the work which we were actually doing on September 27, 1909, had not literally resulted in a technical discovery?

The very obvious answer is that the result of the particular work going on at the date of a withdrawal is not the criterion. "Work leading to discovery" is work such as men do when they wish in good faith to determine the oil bearing character of their tract of land and to develop oil wells thereon. It is for this reason that actual drilling on one part of a tract consisting of four claims or less may properly be said to be "work leading to discovery" on each and all of the claims. Congress recognizes that such work may "tend to determine the oil bearing character" of at least five contiguous claims, as witness the "Five Claims Act."

If one is actually doing work which will *tend to determine the oil bearing character* of his land, it is too narrow a construction to say that it is not of a character to "lead to discovery of oil." Of course a well on one claim will not *directly* result in a technical "discovery" for each of the adjoining claims, but it will *lead* to discovery—and the law says "lead to"—not "directly result in"—discovery.

We do not claim, as counsel seem to think, that drilling and discovery on one claim will perfect all four of the claims. Discoveries must, of course, be

made on each claim before they can go to entry and patent. However, there can be no better inducement to discoveries on contiguous claims than a successful well on adjoining property. Nothing will be more certain to "lead to discovery" thereon. Even an unsuccessful well near to other claims affords a reliable guide and aid in drilling the discovery wells on the contiguous claims. Anything that may fairly be said to be a substantial aid in drilling a well on a claim is work "leading" to discovery thereon. Thus buildings, roads, reservoirs, pipe-lines—all off the particular claim—may under proper circumstances, be held to be work leading to discovery on said claim. Similarly actual drilling on one of the claims may "lead to discovery" on all.

NO TENDENCY TO MONOPOLY—THREE HUNDRED CLAIMS COULD NOT BE HELD ON WORK DISPROPORTIONATE IN CHARACTER AND VALUE TO THE MAGNITUDE OF THE ENTERPRISE.

Next it is suggested that this interpretation would lead to a monopoly; that if work on one well on one claim might evidence due diligence on three other claims, then why not three hundred? The answer is that mere drilling on one claim is not what we rely on. We rely on all of the other work done for the purpose of drilling on the other three claims—the construction of derricks, houses, tank and water pipeline—coupled with the drilling of the one well, the log of which will be an aid to, and is to be imme-

diately followed by, the drilling of wells on the other claims.

As to the suggestion that the same evidence might serve for three hundred claims, we answer that manifestly it would not. The claimant must first show that he was duly diligent with reference to all of his claims at the date of the order. What he has actually done must, of course, be upon a scale commensurate with the size of the tract he is claiming. We know that a two-inch pipe-line and a 1200-barrel tank are of a capacity sufficient, if the water supply is adequate, to serve the drilling necessities of four contiguous claims. How much further it would go we need not here decide. We know also that our camp buildings and improvements were suitable and adequate for drilling four wells. We know, too, that the law itself has long recognized that discovery work done on one claim may "tend to determine the oil-bearing character" of four adjoining claims. One company might well claim four or five contiguous claims where the work on each of them was such as we have here, without suggesting in any way a lack of good faith. But this would not mean that a claimant could establish himself as a *bona fide* claimant if he put forward this same work and improvement as evidence of due diligence on a great number of locations covering two whole townships. It all comes back in each case to the question: Were the things actually done of enough consequence with reference to the enterprise in hand to

evidence good faith and reasonable diligence with regard to the several claims making up the tract claimed? This is a question as readily susceptible of judicial determination as is the question of due diligence with reference to a single tract of 160 acres.

NEITHER DUE DILIGENCE NOR PUBLIC POLICY EXACTS A NEEDLESS WASTE OF MONEY.

The learned Attorney General in his letter of April 16, 1916, to Secretary Lane says:

> "Again, it hardly seems possible that a series of claims can be held by working diligently for them seriatim, or by scattering diligence over them, so to speak, working now for one alone, and again for another. **The situation must be looked at, of course, from a point of view entirely different from that which would prevail if the tracts were already under a common, private ownership. In that event, sound business judgment might dictate that preliminary operations should be confined to some one tract, and that expenditures upon the remaining tracts should be deferred to await results. Failure to obtain oil at the place selected for the first drilling might dictate the abandonment of the entire enterprise. Success there might not only demonstrate the value of the remaining lands, but might furnish fuel for subsequent operations.** So a single water pipe, of moderate dimensions, extended in succession to one tract after another, might suffice for drilling on the tracts in sequence; whereas a much larger and more expensive pipe line, with branches, or a number of such lines would be required to conduct drilling on all of the tracts contemporaneously. **But however wise such methods would be from an economic standpoint on the part of an absolute owner,** I am unable to persuade myself that such foresight and economy can be taken as a substitute for the diligence required under the mining law as to each tract sought to be held."

This point of view was directly in conflict with the view of Commissioner General Tallman, who said in the Honolulu case:

> "If, *when viewed from a practical business standpoint and in accordance with good, approved practice,* the preliminary work of building and maintaining roads, the development of water and fuel systems, the installation of machinery and the construction and equipping of camps are necessary to the work of discovery or essential *as an economic business proposition,* then in my judgment such work and improvements may properly be recognized as work leading to discovery within the meaning and contemplation of the act, provided it is clearly apparent from all the facts that such work and development are designed and intended to develop the particular claim in question."

The Eighth Circuit, by sanctioning the consecutive drilling of claims as a proper showing of diligence under the Pickett Act, has refused to follow the views of the learned Attorney General. This was to be expected, for they were utterly wrong from a legal standpoint. In one breath he conceded that the diligence required under the Pickett Act was the same that would have served to maintain in court the possession of the occupant against a hostile intruder. In the next breath he endeavored to exact of the occupant or claimant a degree of diligence in pushing toward discovery which was unusual, extraordinary, unreasonable, which called for an expedition that was impractical, and which if followed would have been attended by senseless waste. This

the law does not demand. It does not call for any unreasonable or impractical haste.

> "The law does not require any unusual or extraordinary efforts, but only that which is usual, ordinary and reasonable.
>
> "The diligence required in cases of this kind is that constancy or steadiness of purpose or labor which is usual with men engaged in like enterprises, and who desire a speedy accomplishment of their designs.
>
> "Such assiduity in the prosecution of the enterprise as will manifest to the world a *bona fide* intention to complete it within a reasonable time.
>
> "It is the doing of an act, or series of acts, with all practical expedition, with no delay, except such as may be incident to the work itself."

Ophir Silver Mining Co. v. *Carpenter,* 4 Nev., 535, 546-7.

What is there in the spirit of any law touching this case, we would like to ask, which would have made it of advantage to the government if we had drilled our four wells contemporaneously and with economic waste?

Had the withdrawal order never been made, the government would not have cared how much time we took to make our discoveries after posting our location notices.

The beginning of work eight years after such posting was held to be in time in *Borgwardt* v. *McKittrick Oil Co.,* 164 Cal., 651. Therefore, previous to the withdrawal order it would not have concerned the government one whit whether we were diligent or slothful, or whether we had one or four claims.

To come within the protection of the Pickett Act, however, we must have been diligent at the date of withdrawal and we must continue diligent. But if we were reasonably and sensibly diligent and were doing with the land just as if we held a patent and wanted to develop the land in the best possible way, why should the government want to force us to rush ahead to drill three additional wells simultaneously within a few hundred feet of each other, and of the first well, without waiting to get the benefit of the log of the initial well?

Would the people get their oil and gasoline any cheaper if the cost of the wells was needlessly increased?

Would the government have to pay less for the oil that it buys if the oil wells cost more?

Would the land but for our method in drilling consecutively have been open to other citizens to locate oil claims on?

Are we, by keeping any citizen off the land, getting a monopoly of mining ground contrary to public policy?

And finally is the Pickett Act merely a trap to discourage us and so force us off the land by compelling us to proceed with our very difficult undertaking in a manner contrary to sound business principles?

The answers to all of these questions are obvious and from them it follows that no question of public policy arises under the general mining laws or under

the Pickett Act which calls for a simultaneous, wasteful and uneconomical drilling. Much less does it go to the absurd length of exacting simultaneous drilling if simultaneous drilling is impossible for lack of sufficient water.

IF THE PICKETT ACT APPLIES TO THESE THREE CASES, THEN IT SHOULD BE NOTED THAT SAID ACT DOES NOT AUTOMATICALLY FORFEIT THE RIGHTS OF THOSE WHO DO NOT CONTINUE TO USE DUE DILIGENCE AFTER ITS PASSAGE.

This is a further answer to the appellee's change of front regarding Section 2. It also means in all cases that if consecutive drilling is not due diligence the forfeiture is waived unless the government sues prior to discovery of oil.

Suppose—contrary to the fact—that it were true that although the claimants on Section 2 were duly diligent at all times prior to September 27, 1909, and for a time after June 25, 1910, they nevertheless had done no work for several months preceding March, 1911. Suppose, further, that in March, 1911, they again became very diligent, and went ahead and made discoveries, and on each of their claims for several years before this suit was brought had been extracting oil from all of their wells:

Could the government upon the foregoing facts, now step in and say: "Five years ago before you "had made your discoveries you were not diligent "for a while. Your rights were forfeited automatic-

"ally at that time by virtue of the provisions of the "Pickett Act. Since that time you have been tres- "passers. You must forthwith surrender up to us "this property, and all of your improvements are con- "fiscated"?

Whether or not this is the effect of the Act depends upon the nature and extent of the right which the general mining law supplemented by the Pickett Act confers upon one who was a diligent occupant at the date of the withdrawal order.

The Act declares that the occupant's rights shall not be affected or impaired by the President's order *"so long as he continues in diligent prosecution of work leading to discovery of oil or gas."*

If this phraseology creates a condition subsequent, then the rights of the occupant will not be cut off automatically. There must be a re-entry or its equivalent, such as an action of ejectment, and upon settled principles of law, if no suit is brought prior to discovery, any breach of the condition subsequent is waived.

Under the Pickett Act the Occupant Has More Than a Mere License.

The claimant under the Pickett Act has much more than a mere license. The government has made to him much more than a mere general offer applying to all citizens alike. The said Act, coupled with the rights given by the general mining laws, singles out

the occupant or claimant and confers upon him the following rights in the specific real property he is occupying:

1. He alone—not the general public—is granted the right to enter upon, possess and occupy the tract of oil or gas bearing land which he claims. His right, let it be noted, is attached to specific land.

2. He cannot thereafter be ousted from possession by any private individual, however peaceable and unopposed the stranger's entry. No third person can take advantage of any lack of subsequent diligence on the occupant's part.

3. The occupant may at any time sell or otherwise convey away his possessory and other rights, and these rights will pass upon his death to his heirs or devisees.

Rooney v. *Barnette,* 200 Fed., 700, 710;
Hullinger v. *Big Sespe Oil Co.,* 28 Cal. App., 69, 73.

4. The government promises the claimant that his right of occupancy, provided he continues to be duly diligent, shall continue until such time as Congress sees fit—if it ever does see fit—to go through the slow and deliberate process of passing an Act putting an end to his rights. But it further assures him that a discovery will entitle him to hold and work the property.

5. No presidential withdrawal order can affect or impair his rights at the date on which it is made, or thereafter, "so long as such occupant or claimant shall continue to exercise such diligence." So long as he continues diligent, the government itself, without a prior Act of Congress, cannot re-enter upon his claim.

6. The government further promises the claimant that if he shall discover oil or gas on his claim at any time before Congress has revoked his right, he shall after making certain expenditures, have the further right to buy the land at $2.50 per acre and receive the government's patent therefor.

This conditional right of possession for a term which may thus extend over many years—a right which will ripen upon discovery into a vested right to the land and to purchase it in fee simple—a right which cannot be destroyed by the exercise of the arbitrary powers of the President—is, we submit, an interest in land.

London & Southwestern Ry. Co. v. *Gomm,*
20 Ch. Div., 562.
Merrill v. *Mackman,* 24 Mich., 279;
Painter v. *Pasadena L. & W. Co.,* 91 Cal., 84.

Neither the fact that the right may be determined prior to discovery by an Act of Congress nor the further fact that the right may be lost if the diligence of the claimant does not continue, militates against

the fact that the occupant has an interest in the land. On the contrary, they emphasize the character of the claimant's right. Similar or analogous provisions are found every day in deeds and leases.

But whether it is an option, an offer, a transferable license or an interest in the land, is not the important thing. The important thing is that it is a valuable right which will be terminated, if at all, not by a limitation but by a condition subsequent.

Pickett Act Creates a Condition Subsequent—Not a Limitation.

The distinctions between a limitation and a condition are well understood.

> "The principal difference between a condition and a limitation is, that a condition does not defeat the estate when broken, until it is avoided by an act of the grantor or his heirs; but a limitation marks the period which is to determine the estate, without entry or claim."
>
> *Smith* v. *White*, 5 Neb., 405, 407.

> "*Conditions* render the estate *voidable, by entry.*
> "*Limitations* render it *void, without entry.*
> "If, upon failure of that upon which the estate is made to depend, no matter how expressed in the deed, the land is to *go to a third person;* this is a *limitation over,* and *not a condition.* For if a *condition,* an *entry* by the grantor would be necessary; and he might defeat the limitation by neglecting to enter.
> "A *limitation* is *imperative,* and is determined by the *rules of law.*
> "A *condition* not only depends on the option of the *grantor,* but is also *controlled by Equity, if the grantor attempts to make an inequitable use of it.*
> "The performance of a *condition* is excused by the act

of God, or of the law, *or of the party for whose benefit it was made.*"

Greenleaf's Cruise on Real Property, Title XIII, Ch. II, pp. 46-47, *Note.*

See also:

Smith v. *Smith*, 23 Wis., 176.

Whether or not a limitation or a condition is created is purely a question of interpretation. This Court may say "Yes" and it may say "No."

A situation quite analogous is to be found in *Sperry's Lessee* v. *Pond*, 5 Ohio, 387. It there appears that in 1820 one Sperry deeded to one Clark an acre of land to be enjoyed and occupied by Clark, his heirs and assigns *"so long as he, the said Clark, "his heirs and assigns, shall keep a saw-mill and "grist-mill doing business on the premises, allowing, "however, all necessary time for repairs, and no "longer."* Clark erected the mills, and conveyed to one Pond. The grist-mill does no business and was out of repair from 1821 to 1825, and again from 1826 until suit was brought. The saw-mill was out of repair and did no business from the spring of 1824 until the fall of 1825. The court says:

"If the terms of the deed are such as to be construed a limitation (although the reversion was not disposed of, and Sperry could enter for a forfeiture without destroying any remainder), then, the estate of Pond terminated in 1821, and by operation of law, vested in Sperry, where it has ever since remained. 2 *B. C.*, 109, 155. If the

> estate of Clark was *on condition in deed,* then the forfeitures, which happened by suffering the grist mill to remain still and out of repair, in 1821, and suffering the saw mill to remain still and out of repair, in 1824, *were saved by having them both running in 1826,* if Sperry knew of their being out of repair, and of the repairs going on, and did not enter or forbid the repairs. But by supposing the grist mill to go out of repair in 1826, and cease to grind, a forfeiture again occurred, and as the grist mill was not repaired and put in operation before a demand was made by Sperry, the forfeiture still continues. An entry or demand of Sperry revested the title in him. The bringing of this action is such a demand as, in England, would entitle him to recover for the forfeiture."

In the foregoing case the court does not expressly decide whether the provision there in question was a limitation or a condition. There may well have been some proper doubt on this question; for it will be noted that the fact whether the saw-mill and grist-mill were doing business upon the premises, as required by the grant, was a fact that could be readily and clearly ascertained with accuracy as to date; and since it is merely a question of nice interpretation, this fact might aid the conclusion that a limitation rather than a condition was intended. The court was, however, evidently left in doubt as to whether it was a limitation or a condition.

But such is not the situation here. The question of the continuance of due diligence in the prosecution of work leading to a discovery of oil, is one which is not to be answered with reference to a specific date. You may prove with accuracy the day on which a woman ceases to be a widow, or upon which X re-

turns from Rome, and limit an estate upon the event. But due diligence is a very complex and composite proposition. It can only be determined after all of the facts, running over perhaps a very considerable period of time, have been ascertained; and when all of the facts are ascertained, the question of law remains—often a very nice one—as to whether or not these facts do or do not constitute due diligence.

The very nature of such a provision—the impossibility of ascertaining the exact date upon which the diligent prosecution of work may be said to have ceased—imperatively demands, we submit, that such a provision be construed as a condition subsequent, and not as a limitation. To what insecurity of title and possible conflict, it would lead if years after oil is discovered, and perhaps after the property has been enormously developed and has changed hands for millions of dollars, some government clerk could be deputed to make an "investigation" into the diligence of the claimant during the period between the passage of the Pickett Act and prior to a discovery of oil! And then how outrageous for the government to be in a position upon such clerk's *ex parte* and perhaps utterly unwarranted conclusion, that the occupant had not used due diligence on a certain date years and years before, to predicate a claim that the estate had then terminated and that from that time forth all occupants had been trespassers and guilty of a conversion of the oil extracted! The consequences to

which a particular interpretation will lead are always to be considered when the Court is in doubt on a pure question of interpretation.

> "Whether the words amount to a condition, or a limitation, or a covenant, may be matter of construction, depending on the contract. . . . The distinctions on this subject are extremely subtle and artificial; and the construction of a deed, as to its operation and effect, will after all depend less upon artificial rules than upon the application of good sense and sound equity to the object and spirit of the contract in the given case."
>
> 4 *Kent's Comm.*, *133 (12th Ed.).

The following general considerations are to be noted:

> "A court of equity will never lend its aid to devest an estate for the breach of a condition subsequent."
>
> 4 *Kent's Comm.* (12th Ed.), *131.

> "It is usual in the grant to reserve in express terms. to the grantor and his heirs, a right of entry for the breach of the condition; *but the grantor or his heirs may enter, and take advantage of the breach, by ejectment, though there be no clause of entry.*"
>
> *ibid.*, *124.

Condition as to Continued Diligence is Waived if the Government Permits the Occupant to Proceed to Actual Discovery.

It is a general rule that long delay of the grantor in asserting his right, during which time the grantee goes ahead and spends money on the property and makes valuable improvements, will constitute a waiver

of the right to re-enter—or what is its equivalent—to sue in ejectment for the recovery of the property for breach of the condition.

Ludlow v. *N. Y. & Harlem R. R. Co.,* 12 Barb., 444.

This principle is further illustrated in *Sperry's Lessee* v. *Pond,* 5 Ohio, 387, already quoted, where resumption of work at the grist and saw mills prior to demand or suit cured the breach.

If an occupant was not just as diligent for a time as the government now thinks he should have been, it could not sit idly by for years and years, any more than a private individual could, while a claimant continues on to discovery and expends hundreds of thousands of dollars in the expectation of obtaining title to the land.

The conclusion from this discussion, therefore, is that after there has been a discovery, it is too late for the government to step in and seek to obtain a forfeiture for breach of the condition subsequent. Even a court of law—the only court in which the question could arise—would hold the condition to have been waived.

THE FINAL CERTIFICATE ISSUED BY THE LAND OFFICE FOR SECTION 28 BARS ALL INQUIRY INTO THE QUESTION OF DUE DILIGENCE ON SECTION 28.

Counsel for the government appear to have missed the entire point of our argument on this proposition.

We do not doubt that in a proper case suit may be brought by the United States to set aside a patent or to cancel a Receiver's receipt or certificate of purchase for fraud or mistake.

United States v. *Minor,* 114 U. S., 233.

But the point is that this is not such a suit. The complaint makes no mention of the proceedings in the Land Office or of the receiver's final receipt. There is no pleading to support such a theory. The suit was not brought on any such theory.

Plaintiff is now confronted by a final certificate of purchase issued by a department of the government having the jurisdiction to determine whether or not we were duly diligent. That certificate means that facts have been adjudged in our favor—facts which mean that to-day we have the full equitable title and that the government has no title other than a bare, naked legal title. While that certificate stands unrevoked and unassailed by direct attack, it debars the government from making an attack in this collatteral way. The authorities cited in our Opening Brief make this entirely clear.

See particularly:

El Paso Brick Co. v. *Knight,* 233 U. S., 257;
Brown v. *Gurney,* 201 U. S., 193.

CONCLUSION.

Under separate cover our reply to the government's argument on "group development" has been fully briefed. To this we beg to refer the Court.

Upon the oral argument we urged the Court not only to reverse the order appointing a receiver for the lands involved in these suits, but also to order that the bills be dismissed.

That this Court may and should do this if satisfied that the government has in equity no right to this property is well settled.

Smith v. *Vulcan Iron Works,* 165 U. S., 518, 525;
Mast, Foos & Co. v. *Stover Mfg. Co.,* 177 U. S., 485, 495.

This rule applies where the government is a party as readily as it applies in other cases.

> "Though the matter is before us only upon appeal from the order granting the preliminary injunction, we might if satisfied that the government could not prevail upon the final hearing, now order that the bill be dismissed for want of equity. *Smith* v. *Vulcan Iron Works,* 165 U. S., 518-524, 525, 17 Sup. Ct., 407, 41 L. Ed., 810; *Mast, Foos & Co.* v. *Stover Mfg. Co.,* 177 U. S., 485-494, 20 Sup. Ct.,

708, 44 L. Ed., 856; *Harriman* v. *Northern Securities Co.*, 197 U. S., 244-287, 25 Sup. Ct., 493, 49 L. Ed., 739."

Henry Gas Co. v. *United States,* 191 Fed., 132, 140.

Respectfully submitted.

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APPENDIX

IN THE

United States Circuit Court of Appeals

EIGHTH CIRCUIT

No. 4704.—September Term, A. D. 1916.

United States of America, Appellant, vs. The Grass Creek Oil & Gas Company and The Ohio Oil Company, Appellees.	Appeal from the District Court of the United States for the District of Wyoming.

This is an appeal from a decree in favor of the appellees, who were defendants in the court below. - - - - - - - -

The final hearing was on oral testimony, and the court found both issues in favor of the defendants, that of the discovery, and that the defendants on May 6, 1914, were *bona fide* occupants and claimants of these lands, in the diligent prosecution of work leading to the discovery of oil, and continuing thereafter in diligent prosecution of said work. From this decree the United States prosecutes this appeal.

Mr. F. B. Hobgood, Jr., Special Assistant to the Attorney-General (Mr. C. L. Rigdon, U. S. Attorney, was on the brief with him), for appellant.

Mr. William A. Riner (Mr. Timothy A. Burke was on the brief with him), for appellees.

Before SANBORN and CARLAND, Circuit Judges, and TRIEBER, District Judge.

TRIEBER, District Judge, delivered the opinion of the Court.

Under the issues and proofs two questions arise. First: Was there a discovery of mineral oil by the defendants or those

under whom they claim, on the lands in controversy, on or before the 6th day of May, 1914, when the withdrawal order of the lands was made by the President? Second: Were the defendants at the date of said order of withdrawal *bona fide* occupants or claimants of these lands, engaged in diligent prosecution of work leading to the discovery of oil, and continuing thereafter in diligent prosecution of said work, until oil was discovered?

In view of the conclusions reached we deem it unnecessary to determine the first issue, as a finding in favor of the defendants on either issue, must result in the affirmance of the decree. It is a well settled rule governing appellate courts, that the findings of fact by a chancellor, although not conclusive upon appeal in equity, are presumptively correct and persuasive. Unless an error has occurred in the application of the law, or a serious mistake has been made in the application of the evidence, or the finding is clearly against the weight of the evidence, such findings will not be disturbed. And this rule is especially applicable when the evidence was heard orally by the chancellor, and he thus had the opportunity to see the witnesses, observe their demeanor while testifying, judge of their candor and intelligence, and thus be able to determine their credibility and the weight to be given to their testimony. *Harrison* v. *Fite,* 148 Fed., 781, 78 C. C. A., 447; *Coder* v. *McPherson,* 152 Fed., 951, 82 C. C. A., 99; *Mastin* v. *Noble,* 157 Fed., 506, 85 C. C. A., 98; *Harper* v. *Taylor,* 193 Fed., 944, 113 C. C. A., 572; *United States* v. *Marshall,* 210 Fed., 595, 127 C. C. A., 231; *Tobey* v. *Kilbourne,* 222 Fed., 760, 138 C. C. A., 308. The new equity rules have made no change in these respects. *American Rotary Valve Co.* v. *Moorehead,* 226 Fed., 202, 141 C. C. A., 129.

The Act of Congress under which the withdrawal of these lands was made by the President on May 6, 1914, is known as the "Pickett Act," passed June 25, 1910, 36 St., 847, Chap. 421. That Act, so far as it applies to the issues in this case, contains the following proviso: "Provided, that the rights of any person, who at the date of any order of withdrawal heretofore or hereafter made, is the *bona fide* occupant or claimant of oil or

gas bearing lands, and who, at such date, is in diligent prosecution of work leading to the discovery of oil or gas, shall not be effected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work."

As it is claimed on behalf of the appellant that the finding of the trial judge was not warranted by the evidence, and that he committed obvious errors in the application of the law, it becomes necessary to review the evidence. As we deem it unnecessary to determine the correctness of the finding on the first issue, that of the discovery of oil in 1913, we shall confine ourselves to the statement and consideration of the evidence relating to the other issue. Most of the facts on this issue are undisputed and not questioned by either party.

As early as April, 1913, Mr. Harrison, a geologist and mining engineer, visited this section, now known as the "Grass Creek Oil Field"; that in July, 1913, he employed a civil engineer to locate the lands according to the government surveys; that thereupon he located a number of mineral claims as attorney in fact for certain parties, all of whom were qualified to make the locations, among them the lands in controversy. He placed proper location notices on the land, had the location notices properly recorded in conformity with the laws of the United States, of the State of Wyoming, and the rules of miners in that section. He established camps, and drilled for oil on these lands, continuing until September, 1913, when it is claimed oil was discovered. He thereupon sought to obtain the necessary capital to develop these locations. In April, 1914, he showed these lands to representatives of the defendant, the Ohio Oil Company, with a view of leasing them to it, indicating to them what he called the "discovery holes," which he had caused to be drilled in 1913. On April 19, 1914, he entered into an oral contract for the lease of these lands to the Ohio Oil Company, the agreement being made with Mr. McFadyen, who was field superintendent of the Ohio Oil Company. This agreement was made subject to the approval of the officers of the company. A few days thereafter, in April, 1914, this approval was obtained by telegraphic communication, whereupon Mr. McFadyen at once entered upon the lands and placed

in charge thereof, as caretaker, one Virgil Jackson, who remained on the land as the employee of the Ohio Oil Company, as caretaker from that time until after May 6, 1914. On May 4, 1914, Mr. McFadyen ordered the lumber and material which was owned by the Ohio Oil Company and suitable for developing the land for oil, which was then in the town of Casper, to be sent immediately to Kirby, which is the nearest railroad station to these lands. On May 5, 1914, Mr. Harrison returned to these lands, bringing with him tent equipments for the accommodation of the workmen, and which were immediately put up. On the same day, May 5, 1914, Mr. McFadyen for the Ohio Oil Company, entered into a verbal contract with Mr. Good, at Thermopolis, to drill wells on these lands, and to proceed at once. Mr. Good shipped the drilling tools to the land on May 9, 1914, for the purpose of doing the work, and continued uninterruptedly until October 1, 1914. He began actual drilling operations on the northwest quarter on July 1, 1914, as soon as the drilling apparatus had been erected and was in working order, finishing the well on July 24, 1914, when having drilled to a depth of 1047 feet, oil in commercial quantities was discovered. Actual drilling on the east half of the southwest quarter was begun by him on July 31, 1914, and continued until August 20, 1914, when oil was discovered in commercial quantities at the depth of 965 feet.

On May 6, 1914, Mr. Harrison found some persons on these lands, who claimed to be locators under what is known as the Worland locations, but he treated them as trespassers and compelled them to leave, which they did. In this connection it is proper to state that these Worland locators, although made parties defendant to this action, made no defense whatever, nor any claim to the lands by cross-complaint against appellees, thus abandoning any claim which they may have had to the land in controversy and by implication at least, recognizing the superior rights of the Harrison locators, under whom appellees claim. On the same day Mr. Harrison made contracts for supplies to be used in connection with the work of drilling for oil. An engineer of the Ohio Oil Company arrived on that day with a carpenter, who started the work of building the camps on

that day and continued until they were completed. Tents were also put up on that day.

In the meantime Mr. McFadyen was looking after the prompt loading and forwarding of the Ohio Company's rigs, which had been ordered to be forwarded to the land.

Prior to May 6, 1914, the Ohio Oil Company had expended in money and assumed liabilities under its contracts for work on the land, amounting to $2000. The material and lumber for the camps arrived on May 7, 1914, and work was begun at once. On May 10, 1914, the cook house had been completed, and the car containing the equipment reached the railroad station nearest to these lands, and was placed on the siding for unloading. Knowledge of the withdrawal order did not reach the parties until May 14, or 15, 1914.

Since then the Ohio Oil Company has expended for the development of these two tracts of land large sums of money; on the northwest quarter $11,157.92, and on the other tract $10,-152.97. Thereafter and before the institution of this suit there was spent by the Ohio Oil Company $629.36 in operating the wells and $15,000 for the construction of a 37,500-barrel steel storage tank. These sums do not include the expenditures made by Mr. Harrison prior to his contract with the Ohio Company.

There was evidence introduced on the part of the government that on May 5, 1914, a Mr. Walker went on the land with a party of prospectors, and he did not see any work under way, that at a few points he found some three-inch pieces of pipe and a drill hole on each of the quarters. A Mr. Orchard, another witness for the government, testified that he went on these lands March 25, 1914, and saw no improvements, except a few pieces of pipe sticking out of the ground. Mr. Valentine, another witness for the government, testified that he was on these lands on May 5, 1914, and saw no one there, but saw a piece of pipe sticking out of the ground on the southeast quarter, but nothing on the northwest quarter.

In our opinion the evidence clearly justified the finding by the chancellor, that from the time Jackson was employed and

placed on the land as caretaker for the defendant, the Ohio Oil Company was an occupant of the land.

But, it is claimed, that even if that is true, the defendant, the Ohio Oil Company, was not a *bona fide* occupant or claimant of these lands, in the diligent prosecution of work leading to the discovery of oil or gas on May 6, 1914, when the order of withdrawal was made. It is claimed that actual drilling operations were not commenced until July 1, 1914, on the northwest quarter, and on July 31, 1914, on the east half of the southwest quarter, and that until the actual drilling was begun there was no prosecution of work within the meaning of the Act of Congress. We are of the opinion that this is too narrow a view to take of this statute. The enactment of this proviso by Congress could have had but one object in view, and that was to protect the rights of all persons who at the date of an order of withdrawal, are occupying or claiming oil-bearing lands in good faith, for the purpose of acquiring them under the laws of the United States, and are diligently prosecuting the work leading to the discovery of oil. Before the enactment of this statute discovery of the mineral was essential to make a location. As frequently, in fact in most instances, prospecting was necessary in order to determine whether oil or gas are on the public lands, and large sums of money were necessarily expended to ascertain this fact, Congress by this proviso in the Act of 1910, extended its protecting arm to those acting in good faith in an effort to ascertain whether there was oil or gas under them. In our opinion when a citizen of the United States, in good faith enters upon public land for the purpose of discovering oil or gas, takes possession of the land by placing a caretaker thereon while he is taking proper steps to obtain the material necessary for the work of constructing the camps, enters into contracts for drilling, acting as expeditiously as possible, in erecting camps and preparing for the drilling, spends money and enters into contracts whereby he becomes liable for sums of money to prosecute the work leading to the discovery of oil or gas, and as soon as it is possible, by the exercise of proper diligence, begins the work of drilling and continues it diligently and expeditiously

until oil is discovered in commercial quantities, he is within the protection of this proviso. As was stated in *Borgwaldt* v. *McKittrick Oil Co.,* 164 Cal., 150, although that case did not involve this Act of Congress, but was a contest between claimants, "We do not mean to hold that such diligent prosecution of the work may not include such actual preparation for the same as the bringing to the claim of material necessary therefor." The learned counsel for the government in fact concedes the correctness of this proposition. In his brief he says: "It is not contended by the government that the construction of a camp might not be a part of such work, but that, unless such camp is for the purpose of furnishing a base for drilling operations upon the claims in controversy, its construction is not diligent prosecution of work, so far as the claims in controversy are concerned." The evidence clearly shows that the defendants brought themselves within this rule. Everything they did was "for the purpose of furnishing a base for drilling operations on the lands in controversy." For what other purpose did they make these expenditures, and enter into contracts for erecting the camps, and the drilling by Mr. Good?

The learned trial judge committed no error in the application of the law to the facts, as shown by the evidence, and the evidence sustains his findings beyond question.

The decree of the District Court is *Affirmed.*

Filed October 13, 1916.

A true copy.

Attest: JOHN D. JORDAN,

Clerk U. S. Circuit Court of Appeals, Eighth Circuit.